

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-2137

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
LEON BUSH,

Petitioner-Appellant,

-against-

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.
-----x

BH
Docket No. 77-2137



APPENDIX TO PETITIONER-APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

Attorney for Petitioner-Appellant.

STEVEN LLOYD BARRETT,
Of Counsel.

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7/6C	1676	1676	09 10 76	APPEAL	PRATT, J.
PLAINTIFFS				DEFENDANTS	

BUSH, LEON

LEON BUSH

Appeal

FOGG, WALTER

WALTER FOGG, Acting Superintendent
Green Haven Correctional Facility

CAUSE

28 U.S.C. § 2254
HABEAS CORPUS

ATTORNEYS

FOR PLATFF:
LEON BUSH-PRO SE
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Drawer B
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77-2137

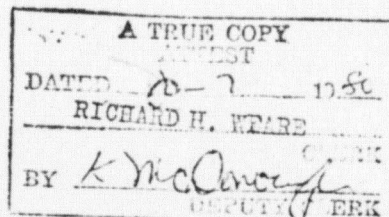
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BUSH VS BGG

PROCEEDINGS

DATE	NR.		
9-10-76		Petition for a writ of habeas corpus filed.	(1)
9-21-76		BY PRATT, J.- Order to show cause dtd 9-20-76 why a writ of Habeas Corpus should not be issued etc. filed. Copies mailed to Atty Gen. and plntff.	(2)
10-5-76		By PRATT, J.- Order dtd. 10-1-76 extending time to respond to petition to 10-25-76 filed.	(3)
11-8-76		By PRATT, J.- Order dtd 11-4-76 extend ing time for respondent to answer petition to 11-24-76 filed.	(4)
11-23-76		Affidavit in opposition filed.	(5)
12-3-76		Petitioner's reply to affidavit in opposition filed.	(6)
5-25-77		By PRATT, J.- Memo and order dtd, 5-23-77 dismissing the petition for a writ of habeas corpus filed.	(7)
5-25-77		Judgment that the petitioner take nothing of the respondent and that the petition is dismiss filed	(8)
9/21/77		Notice of appeal with request for certificate of probable cause filed.	(9)
10-3-77		By PRATT, J.-Memorandum and order dtd 9-28-77 filed that certificate of probable cause is to issue and permission to proceed with appeal in forma pauperis is granted. FILE CERTIFIED AND MAILED TO C OF A.	(10)
10-11-77		Acknowledgement from the C of A for record on appeal filed.	(11)cg
10/14/77		2nd notice of appeal filed. Copy of Notice of Appeal and docket sheets mailed to the C of A.	(12)
3-13-78		Record on appeal recieved from C of A. Acknow. mailed.	fy ---
6-1-78		By Pratt, J.- memo and order dtd 5-24-78 directing the Atty Gen. of the State of New York to submit the record and transcript of the state trial to this court by 6-9-78 etc. filed. Copies mailed to parties.	(13)
11-2-78		Memo of law for petitioner-appellant on remand form C of A filed with affidavit of Steven L. Barrett.	(14, 15)
11-13-78		Affidavit of Kathleen H. Casey filed.	(16)
11-27-78		Affidavit of Steven Lloyd Barrett filed.	(17)
8-10-79		By PRATT, J. - Memo and order dtd 8-7-79 that the court finds there was no actual prejudice to the petitioner resulting from lack of notice of the identity of the three rebuttal witnesses and adheres to its decision of 5-23-77 denying petitioner's application for a writ of habeas corpus filed. Copies sent.	km (18)
9-4-79		Notice of appeal filed. Copy of notice and cert. copy of docket sheet sent to C of A.	km (19)
1-4-80		Civil appeal scheduling order #1 filed.	km (20)
1-7-80		Above record certified and handed to Joan Gill for delivery to C of A.	km ---



THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. LEON
BUSH, Appellant.

Argued November 19, 1973; decided December 23, 1973.

Crimes—murder—notice of alibi—selection of jury—contentions by defendant, convicted of felony murder and manslaughter, that trial court's selection of jury under procedure then mandated by Judicial Conference (22 NYCRR 20.13) was violative of his rights to fair trial, that absence of reciprocity in notice-of-alibi statute (Code Crim. Proc. § 295-1) rendered it unconstitutional, that record did not support trial court's finding as to voluntariness of statements made by him, that remarks made by prosecutor during summation deprived him of fair trial and that trial court committed reversible errors in its charge—judgment of conviction was properly affirmed—however, section 295-1 of Code of Criminal Procedure is held unconstitutional, with this decision to apply to cases in which trial began after June 11, 1973, date of United States Supreme Court decision holding similar notice-of-alibi statute of Oregon unconstitutional (*Wardius v. Oregon*, 412 U. S. 476), but not to cases where trial began prior to that date unless defendant was prevented from introducing testimony to support his alibi defense as sanction for his failure to comply with notice-of-alibi statute—Court of Appeals does not reach question of retroactivity on direct appeal in such cases—defendant's other contentions are without merit.

People v. Bush, 49 A D 2d 591, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 5, 1972, which affirmed a judgment of the Supreme Court (HYMAN BARSZAY, J.), rendered in Kings County upon a verdict convicting defendant of felony murder and manslaughter in the second degree. The indictment charged defendant with felony murder and common-law murder, based on the fatal stabbing of one Robert Wheeler on August 30, 1969. At the time of defendant's trial, in 1971, rule 20.13 of the Rules of the Administrative Board of the Judicial Conference (22 NYCRR 20.13) provided that "A *voir dire* examination in any criminal cause shall be conducted following the selection of prospective jurors. The judge presiding shall initiate the *voir dire* examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge shall then put to the prospective jurors any questions which he thinks necessary, affecting their qualifications to serve as jurors in the cause on trial. The judge may, also, in his discretion, permit both parties, commencing with the people, to examine the prospective jurors, individually or collectively, to the extent he deems necessary, regarding their qualifications to serve as jurors." (Cf. CPL 270.15, added by L. 1970, ch. 996, eff. Sept. 1, 1971.) Section 295-1 of the Code of Criminal Procedure, which was then in effect, provided that "In all cases where a defendant has been indicted by a grand jury, the prosecuting officer may, not less than eight days before the case is moved for trial, serve upon such defendant or his counsel and file a demand which shall require that if such defendant intend to offer, for any purpose whatever, testimony which may tend to establish his presence elsewhere than at the scene of the crime at the time of its commission, he must within four days thereafter serve upon such prosecuting officer and file a bill of particulars which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences, and places of employment of the witnesses upon whom he intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Unless the defendant shall, pursuant to such demand, serve and file such bill of particulars, the court, in the event that such testimony is sought to be interposed by the defendant upon the trial for any purpose whatever, or in the event that a witness not mentioned in such bill of particulars is called by the defendant to give such testimony, may

exclude such testimony, or the testimony of such witness. In the event that the court shall allow such testimony, or the testimony of such witness, it must, upon motion of the prosecuting officer, grant an adjournment not to exceed three days." (Cf. CPL 250.20.) In the Court of Appeals defendant argued, *inter alia*, that the trial court's selection of a jury under the procedure mandated by the Judicial Conference was violative of his rights to a fair trial; that the absence of reciprocity in the notice-of-alibi statute rendered it unconstitutional; that the record did not support a finding, made by the trial court following a pre-trial hearing, that the voluntariness of oral, written and typewritten statements made by him had been established beyond a reasonable doubt; that remarks made by the prosecutor during his summation deprived him of a fair trial, and that the trial court committed reversible errors in its charge.

David T. Berman for appellant.

Eugene Gold, District Attorney (Roger Bennet Adler of counsel), for respondent.

Per Curiam. We find no significant difference between section 295-1 of the Code of Criminal Procedure, applicable here, and the notice-of-alibi statute of the State of Oregon held unconstitutional by the United States Supreme Court in *Wardius v. Oregon* (412 U. S. 470). Accordingly we hold section 295-1 unconstitutional.

We recognize, however, "the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective'" (*Johnson v. New Jersey*, 384 U. S. 719, 726). In our view section 295-1 as applied in this instance did not operate to exclude testimony. In response to the District Attorney's demand, defendant here furnished the names of his alibi witnesses. Their testimony was admitted on trial, as was that of the prosecution's rebuttal witnesses. The statute operated only to deny defendant advance notice of the identity of these rebuttal witnesses, and to this extent to hinder his preparation to impeach, discredit or rebut their testimony. He was not, however, inhibited in his own opportunity by direct evidence to establish his alibi. The infringement of defendant's rights went only to a collateral though not unimportant issue. Thus, we conclude that on this record the operation of the rule did not go to "the very integrity of the fact-finding process"; rather it touched on procedural fairness to defendant.

On the basis of this evaluation we hold that *Wardius* and our present decision shall apply to cases in which the trial began after June 11, 1973, the date of the Supreme Court decision in *Wardius* (cf. *Linkletter v. Walker*, 381 U. S. 618; *Tehan v. Shott*, 382 U. S. 406; *Johnson v. New Jersey*, *supra*; *Stovall v. Denno*, 388 U. S. 293; see *People ex rel. Cadogan v. McMann*, 24 N Y 2d 233), but shall not apply to cases where the trial began prior to that date, unless, as occurred in *Wardius* but unlike the situation here, the rule was applied to prevent a defendant from introducing testimony to support his alibi defense as a sanction for his failure to comply with the notice-of-alibi statute.

We do not reach the question as to retroactivity on direct appeal in such cases and leave that determination to another day.

We have examined appellant's other contentions and find them to be without merit.

Accordingly the order of the Appellate Division is affirmed.

Judges BURKE, BREITEL, JASEN, GABHELLA, JONES and WACHTLER concur in *Per Curiam* opinion; Chief Judge FULD taking no part.

Order affirmed.

U.S. DISTRICT COURT
E.D.N.Y.

★ MAY 25 1977 ★

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.
P.M.

----- x
LEON BUSH,

DOCKET NO. 76 C 1676

Petitioner,

- against -

WALTER FOGG, Superintendent, Green
Haven Correctional Facility,

MEMORANDUM AND ORDER

Respondent.
----- x

PRATT, J:

By petition for a writ of habeas corpus, 28 USC §§ 2241 & 2254, filed pro se, Leon Bush seeks to vacate his conviction on September 23, 1971 in the New York Supreme Court, Kings County, for felony murder and second-degree manslaughter, for which he is now serving concurrent terms of 15 years to life, and 15 years, respectively. For the reasons set forth below, his petition must be dismissed on its merits. 1/

I.

On February 17, 1970, Bush was arrested in connection with the killing and robbery of one Robert Wheeler on August 30, 1969 in Brooklyn, New York. After being taken

(7)

to the local police station, Bush confessed to the stabbing and robbery of Wheeler -- first orally, then in a signed writing, and finally, orally in the presence of a stenographer. After a jury trial, he was convicted of felony murder and second-degree manslaughter, a lesser-included offense of the crime of common law murder charged in his indictment. The State's case was based to a large extent upon Bush's confessions. In an attempt to establish an alibi, he adduced testimony of friends and relatives to the effect that he had been in New Orleans at the time of the crime. Bush himself testified that on August 27, 1969, three days prior to the stabbing, he left Brooklyn for New Orleans where he remained until the following December. In rebuttal, the State elicited testimony that he had been in Brooklyn throughout August and the first half of September of 1969.

II.

Citing Morales v. New York, 396 US 102 (1969), Bush made a pretrial attempt to suppress his confessions on the ground that they constituted inadmissible fruit of his illegal arrest. See Brown v. Illinois, 422 US 590 (1975). The trial court held an extensive evidentiary hearing to determine whether there had been probable cause for the

warrantless arrest, as well as the separate issue whether Bush's confessions had been voluntary. State's appendix on appeal to New York Court of Appeals [A.], at 1-239. The trial judge held that the arresting "officer [a Detective McCarthy] had probable cause to take the defendant in custody," A. at 81, accord, A. at 245, and indicated that this conclusion was at least primarily based on a finding that, before arresting Bush, Detective McCarthy, had been informed that, shortly after Robert Wheeler was killed, Bush had admitted stabbing a man. See A. at 245. See also A. 67-72.^{2/}

Bush now seeks to vacate his convictions on the grounds that the trial judge erred in finding probable cause for the arrest and that the confessions which ensued should have consequently been suppressed. But under the circumstances here, the "full and fair litigation" doctrine articulated in Stone v. Powell, 96 SCt 3037 (1976), and Simmons v. Clemente, (CA2 Mar 24, 1977), bars this court from granting federal habeas corpus relief on these grounds.

In Stone, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that

evidence obtained in an unconstitutional search or seizure was introduced at his trial." 96 S Ct at 3052 (footnotes omitted). While Stone involved evidence obtained in allegedly unlawful searches, in Simmons v. Clemente the Second Circuit applied Stone where, as here, unsuppressed evidence had been obtained as a result of an allegedly unlawful arrest.

The question remains, of course, whether Bush has been provided an opportunity for full and fair litigation of his fourth amendment claim. I hold that he has, since he has been afforded no less of an opportunity to litigate his claim than that afforded the petitioners in Stone. As noted previously, the constitutionality of Bush's arrest was determined upon factual and legal conclusions arrived at by the trial court after a lengthy evidentiary hearing. While, unlike the petitioners in Stone, Bush did not seek direct review of this particular determination, he had the "opportunity" to do so.^{3/} In short, petitioner has been "afforded the opportunity for full and fair consideration of [his] reliance upon the exclusionary rule * * * at trial and on direct review." Stone v Powell, supra at 3049. Accordingly, he may not now invoke the rule again on federal habeas corpus review.

III.

Petitioner contends that, even if his arrest was lawful, his confession should have been suppressed as involuntary. In the pretrial suppression hearing, the trial court heard extensive testimony on the voluntariness issue and decided it against petitioner.

The only evidence elicited at the hearing which supported petitioner's claim that his confessions were involuntary was his own testimony. He stated that he had confessed only after being punched, kicked, and beaten with a night stick by Detective McCarthy, and possibly others. McCarthy, who elicited the confessions, denied these allegations and testified that Bush confessed voluntarily after approximately one hour of questioning. Bush's claims of coercion were also contradicted by both the assistant district attorney and the stenographer who witnessed his third and final confession; by a Detective Byrnes who was present during the first (oral) confession and part of the second (written) one; by the correction officer who processed Bush for arraignment the following afternoon; and by a Department of Corrections doctor who examined him two days after he confessed. Petitioner conceded at the hearing that he had been promptly

advised of his Miranda rights.

At the conclusion of the hearing, the trial judge found as follows:

I do not credit from the testimony adduced that the defendant was any wise threatened, intimidated, assaulted, beaten by the detective or anyone else in the stationhouse, and I discount that testimony completely irrespective of the rebuttal, on his own testimony that he gave. But the rebuttal aided me to agree in rejecting his claim of having been beaten.

So I hold that beyond a reasonable doubt the prosecution has established the oral statement, the written statement, and stenographic statement had been made voluntarily, and I rule that each of them is admissible.

A. 247

Finding more than ample support in an extensive record which petitioner has not sought to supplement, this conclusion may not be disturbed. 28 USC §2254(d). LaVallee v. Delle Rose, 410 US 690, 694-95 (1973); United States ex rel. Lewis v. Henderson, 520 F2d 896, 903-04 (CA2 1975).

IV.

The jury that convicted Bush was selected pursuant to former Rule 20.13 of the Administrative Board of the Judicial Conference (the rule), 22 NYCRR 20.13 (1971). The

rule provided in pertinent part:

The judge shall * * * put to the prospective jurors any questions which he thinks necessary, affecting their qualifications to serve as jurors in the cause on trial. The judge may also, in his discretion, permit both parties, commencing with the People, to examine the prospective jurors individually or collectively to the extent he deems necessary, regarding their qualifications to serve as jurors.

Citing Swain v. Alabama, 380 US 202, 219 (1965), petitioner contends that the trial court's application of the rule, over his attorney's objection, precluded the meaningful exercise of his peremptory challenges and consequently violated his constitutional right to an impartial jury.^{4/} Bush appears to be concerned primarily with the fact that the rule afforded the trial judge the discretion to disallow questioning of veniremen directly by counsel. However, the provision of similar discretion to federal judges under FRCrP 24(a) has been held constitutional. United States v. Anderson, 433 F2d 856, 858 (CA8 1970); United States v. Duke, 409 F2d 669, 671 (CA4 1969), cert. denied, 397 US 1062 (1970); Rodgers v. United States, 402 F2d 830, 831 (CA9 1968). In addition, petitioner does not argue that special circumstances dictated that his attorney be allowed personally to examine the prospective jurors.

Bush may also be arguing that his right to an impartial jury was violated by the trial court's collective examination of the prospective jurors.^{5/} But he does not even allege that his attorney made a request that a particular question be put to the veniremen individually, or collectively. Absent such a request, let alone any allegation of specific prejudice resulting from one's denial, the selection of petitioner's jury can in no way be considered to have been unconstitutional. See United States v. Dansker, 537 F2d 40, 55-57 (CA3 1976).

V.

Petitioner claims that his conviction and sentencing for the crimes of felony murder and second-degree manslaughter violated his constitutional right not to be twice placed in jeopardy. See Benton v. Maryland, 395 US 784, 787, 794 (1969). Essentially, he contends that he is being punished twice for the same homicide. See North Carolina v. Pearce, 395 US 711, 717 (1969).

In Blockburger v. United States, 284 US 299, 304 (1932), the Supreme Court reaffirmed its previous adoption of the language of the Supreme Court of Massachusetts in Morey

v. Commonwealth, 108 Mass 433, 434 (1871):

A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Under then §125.15(1) of New York's Penal Law, Bush's second-degree manslaughter conviction necessitated a finding that he killed Robert Wheeler "recklessly", and under then NYPL §125.25(3) his felony murder conviction necessitated a finding that, when he stabbed Wheeler, he did so "in the course of and in furtherance of" the commission of a robbery. However, the second-degree manslaughter conviction did not necessitate proof of a predicate felony, here robbery, and the felony murder conviction did not necessitate proof that Wheeler's death was caused "recklessly". Consequently, each statute under which Bush was convicted required "proof of an additional fact which the other [did] not".

While this formulation has come under serious criticism since it was last approved by the Supreme Court in Blockburger v. United States, to apply it here would not be "to extend it to the point of rigid formalism", see United States v. Cioffi, 487 F2d 492, 496-98 (CA2 1973), since each

of petitioner's convictions "required proof of a significant fact not required to sustain the other", contrast United States v. Sabella, 272 F2d 206, 211 (CA2 1959) (emphasis added). Consequently, petitioner's double jeopardy claim is meritless.^{6/}

VI.

Moments after indicating that he had concluded the People's case, the prosecutor sought to enter the victim's pocket knife and sunglasses into evidence. The court allowed him to do so over defense counsel's objection. Petitioner implies that this constitutes a basis for vacating his convictions. The contention is frivolous. Under both New York and federal law, a trial judge may in his sound discretion allow the prosecution to reopen its case. People v. Olsen, 34 NY2d 349, 353 (1974); People v. Benham, 160 NY 402, 437 (1899); United States v. Jones, 480 F2d 1135, 1137 (CA2 1973). Clearly, there was no abuse of discretion here, much less any error of constitutional proportions.

VII.

Petitioner claims that his right to a fair trial was violated by statements made by the prosecutor in his

summation. This contention would be cognizable for purposes of federal habeas review only if the challenged statement violated Bush's right to due process. Donnelly v. DeChristoforo, 416 US 637, 642 (1974). "Simply stated, the due process test is whether the prosecutor's remarks were so prejudicial as to deprive the defendant of a fair trial." Malley v. Connecticut, slip op at 1035 (CA2 Dec 20, 1976). Here, Bush appears to be objecting to two aspects of the prosecution's summation.

When arrested, Bush identified himself as his brother Donald. In his direct testimony, he explained that he had done so because he had his brother's identification on him at the time, and because he had just been released from jail where he had been held under his brother's name. A. 553-54. Petitioner now objects to the prosecution's suggestion in its summation that he concealed his identity from the detectives who arrested him because he knew they were looking for him, and not his brother.

At trial, defense counsel objected to the implication that the jury could infer consciousness of guilt from these circumstances. A. 715-16. The judge overruled the objection and explained to the jury that, depending on their

view of the evidence, they could either accept or reject the inference. The court's ruling appears to have been proper and certainly did not constitute constitutional error.

Petitioner's second objection to the prosecution's summation relates to a remark made about his alibi defense. In defense counsel's closing statement, he emphasized that two of the three witnesses whose testimony rebutted petitioner's alibi had surfaced only two or three weeks before the trial. A. 697. In its summation, the prosecution responded to this argument as follows:

These two people testified, as Mr. Roseman said, they only came forward three weeks ago. It was not necessary to look for them until Mr. Bush brought up the alibi. Do you think when a man confesses to a crime, that the police department has nothing else to do but to go out and try to find every person that ever knew him? We had three confessions from him. But now he injects a new fraud.
A. 728.

Defense counsel objected to the remark 'now he injects a new fraud', arguing in the presence of the jury that the prosecution had known of Bush's alibi defense since his testimony before the grand jury, more than a year before. Petitioner makes the same argument here.

The argument fails, however, because the alibi defense asserted by Bush at his trial differed significantly from the one he had asserted before the grand jury. There, he had testified that he had left Brooklyn for New Orleans two months before the murder of Robert Wheeler on August 30, 1969. The prosecution, however, had a witness who would testify that Bush had given him a bad check in Brooklyn on August 26, 1969. Moreover, the prosecution had the check to corroborate this testimony. But the prosecution later learned that Bush's trial testimony would be that he had not left Brooklyn until August 27. In short, Bush had come up with a new alibi, thereby necessitating additional rebuttal testimony. Consequently, the prosecution's characterization of the altered alibi as a "new fraud" may well have constituted fair comment. In any event, it certainly did not so infect the trial with unfairness as to deny Bush his constitutional right to due process.

VIII.

Petitioner challenges the adequacy of the instructions given the jury on his alibi defense. Specifically, petitioner objects to the following instructions:

If you believe the alibi, you must acquit the defendant. If you disbelieve the alibi, you will then consider the confessions attributed to the defendant; so that even if you reject the alibi, you must go further and find that the confessions attributed to the defendant were made by him, were true and were accurate and voluntary. A. 795.

Viewed in isolation, this instruction is troublesome since it does not mention the prosecution's burden to disprove Bush's alibi beyond a reasonable doubt. But especially in a habeas corpus proceeding, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 US 141, 146-47 (1973). Here, in the paragraph preceding the challenged instruction, the court explained to the jury:

First, with respect to the alibi, the prosecution must prove to your satisfaction beyond a reasonable doubt that the alibi offered by the defendant is false. Second, the prosecution must likewise prove to your satisfaction beyond a reasonable doubt that the confessions attributed to the defendant and [sic] were made by him, were true, accurate and voluntary. A. at 794.

Thus, the court emphasized the prosecution's burden of proving beyond a reasonable doubt both the untruthfulness of Bush's alibi and the accuracy and voluntariness of his con-

fessions. See also A. at 784-85.

IX.

Bush also contests the adequacy of the trial court's charge on the requirement of then §395 of New York's Code of Criminal Procedure that a defendant's murder confession be corroborated by outside evidence of the crime. Specifically, petitioner objects to the following portion of the charge:

If you should determine on all of the evidence in the case, submitted to you that the defendant made true, accurate and voluntary confessions, and if you further determine that there was additional evidence outside of the confessions that the crime charged was committed, then you would be justified in finding the defendant guilty of the crime or the degree of the crime concerning which I charged you. You must be satisfied of each of these elements beyond a reasonable doubt.

On the other hand, if you are not so convinced beyond a reasonable doubt, you must reject the confessions and acquit the defendants [sic], because in this case, outside of the confessions, there is no evidence whatsoever to connect the defendant with the commission of the crime.

A. 795.

Section 395's corroboration requirement, however, was satisfied by evidence of the victim's "body, bearing

marks of murder, 'tokens of a fatal wound'". People v. Louis, 1 NY2d 137, 141 (1956). Here, the trial court correctly instructed the jury that, if believed, the testimony of the medical examiner who examined Wheeler's body was sufficiently corroborative of petitioner's confession. See A. 193-94.

Petitioner has possibly been misled by the trial court's comment to the jury that "outside of the confession, there [was] no evidence whatsoever to connect the defendant with the commission of the crime". A. at 795. The evidence mandated by §395 need not, however, corroborate a defendant's complicity in a murder, it must merely corroborate the defendant's statement that someone was murdered. People v. Louis, ^{7/}supra.

X.

Finally, Bush's petition presents a claim predicated on the Supreme Court's holding in Wardius v. Oregon, 412 US 470, 472 (1973), that the due process clause forbids enforcement of [notice-of-] alibi rules unless reciprocal rights are given to criminal defendants". At the time of Bush's trial -- more than two years before Wardius was decided -- then §295-1 of New York's Code of Criminal Pro-

cedure provided:

In all cases where a defendant has been indicted by a grand jury, the prosecuting officer may, not less than eight days before the case is moved for trial, serve upon such defendant or his counsel and file a demand which shall require that if such defendant intend to offer, for any purpose whatever, testimony which may tend to establish his presence elsewhere than at the scene of the crime at the time of its commission, he must within four days thereafter serve upon such prosecuting officer and file a bill of particulars which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences, and places of employment of the witness upon whom he intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Unless the defendant shall pursuant to such demand, serve and file such bill of particulars, the court, in the event that such testimony is sought to be interposed by the defendant upon the trial for any purpose whatever, or in the event that a witness not mentioned in such bill of particulars is called by the defendant to give such testimony, may exclude such testimony, or the testimony of such witness. In the event that the court shall allow such testimony, or the testimony of such witness, it must, upon motion of the prosecuting officer, grant an adjournment not to exceed three days.

Pursuant to this provision, the prosecution served upon Bush's counsel a demand for disclosure of (1) any alibi defense that might be presented at trial, and (2)

the names and addresses of possible alibi witnesses. After an unsuccessful pretrial attack upon the constitutionality of New York's notice-of-alibi rule, defense counsel complied with the prosecution's demand. Then, on the eve of trial he moved that the prosecution be directed to disclose the names and addresses of any rebuttal witnesses, but the motion was denied. As noted previously, Bush attempted to establish an alibi defense, and the prosecution called three witnesses to rebut it. By the time the case reached New York's Court of Appeals, Wardius had been decided. On the basis of that decision, the New York court held that the State's notice-of-alibi statute was unconstitutional, but declined to apply this holding retroactively in Bush's case. The court reasoned that retroactive application of Wardius would be appropriate only where, as was true in Wardius, a defendant had actually been foreclosed from presenting an alibi defense because of his failure to comply with a non-reciprocal notice-of-alibi statute. People v. Bush, 33 NY2d 921 (1973), cert. denied, 419 US 848 (1974). Bush contends, however, that Wardius should also be applied retroactively in cases such as this where application of the unconstitutional notice provision conceivably impaired the defendant's ability to impeach and surrebut the testimony of the State's

rebuttal witnesses.

At least under the circumstances of this case, this contention must be rejected. The first of the State's three rebuttal witnesses was a Mr. Rawitz. He testified that Bush cashed a bad check at his Brooklyn bar on August 26, 1969, four days before the murder. While this testimony contradicted Bush's grand jury testimony, it was consistent with his testimony at trial. Presumably for this reason, Rawitz was not cross-examined.

The only rebuttal witnesses who contradicted the trial version of Bush's alibi were a Mr. and a Mrs. Curtis. They testified that in the summer of 1969 they had rented a room to Bush's cousin, Gerald Richardson, that Bush had shared the room with Richardson during the latter part of the summer, and that Mr. Curtis had been forced to evict Bush and Richardson on September 16, 1969, for failure to pay the rent. Since Bush had previously testified to his presence in New Orleans during the entire month of September, 1969, defense counsel cross-examined both Mr. and Mrs. Curtis. Significantly, however, at no time did defense counsel move for a recess or a continuance in which to prepare his cross-examination of any of the three rebuttal witnesses. See

Green v. Fogg, 422 F Supp 1034, 1036 (SDNY 1976). Nor is there now any allegation of specific prejudice incurred by petitioner as a result of the State's refusal to disclose the identify of these witnesses prior to their testimony. See Mayer v. Moeykens, 373 F Supp 649, 654 (D Vt 1973), aff'd, 494 F2d 855 (CA2), cert. denied, 417 US 926 (1974).

"The test utilized repeatedly by [the Supreme] Court to ascertain whether 'new' constitutional protections in the area of criminal procedure are to be applied retroactively calls for consideration of three criteria: '(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'" Michigan v. Payne, 412 US 47, 51 (1973) (citations omitted).

A. Purpose of the New Standard.

"Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." Williams v. United States, 401 US 646,

653 (1971). Had application of the New York notice-of-alibi rule led to Bush's abandoning his alibi defense, the purpose of the Wardius doctrine might well have dictated a new trial, since the trial court's truth-finding function arguably would have been substantially impaired. See United States ex rel. Hairston v. Warden, 407 F Supp 524 (ND Ill), rev'd on other grounds, 539 F2d 713 (CA7 1976); People v. Bush, supra (dictum). Here, however, Bush was not deterred from presenting his alibi defense. Moreover, no continuance was requested, and no specific prejudice was then or has subsequently been alleged. Under such circumstances, the application of the unconstitutional notice provision in Bush's case should not be assumed to have "substantially" impaired the trial court's truth-finding functions. "[R]etroactivity is not required [merely] by a determination * * * that the truth-determining process has been aided somewhat by the new standard * * *." Gosa v. Mayden, 413 US 665, 680 (1973).

B. Reliance.

The Wardius doctrine was not clearly forecast by any prior decision of the Supreme Court. Indeed, in Williams v. Florida, 399 US 78, 82 n 11 (1970), where the Court upheld Florida's reciprocal notice-of-alibi statute,

it expressly noted that it was not deciding the constitutionality of NY Code Crim Proc §295-1. Nor can it be said that the Wardius decision was clearly forecast by any trend of lower court decisions. Under such circumstances, legislative and judicial reliance on the New York notice-of-alibi provision was justifiable.

C. Effect of Retroactive Application.

Because that reliance began in 1935 when the provision went into effect, the retroactive application of Wardius in cases such as this would almost certainly result in substantial interference with the administration of justice in New York, not to mention other states with similar statutes, e.g., Oregon and Illinois.

D. Conclusion.

Since all three of the relevant criteria articulated by the Supreme Court indicate that Bush should not be allowed to benefit from retroactive application of the Wardius doctrine, his claim to the contrary is rejected.

XI.

For the foregoing reasons, petitioner's applica-

tion for a writ of habeas corpus is dismissed

SO ORDERED.

Dated: Westbury
May 23, .

GEORGE C. PRATT
U. S. DISTRICT JUDGE

FOOTNOTES

1/ Only with respect to one of petitioner's claims, does the State assert a failure to exhaust state remedies. However, that claim -- that the trial court committed constitutional error in admitting into evidence pretrial confessions elicited from Bush shortly after his unlawful arrest -- has been presented to the New York courts by means of a motion to vacate, filed with the trial court on February 19, 1976, pursuant to New York Criminal Procedure Law §440.10(1)(h). See Affidavit in Support of Motion to Vacate Judgment, filed with the Supreme Court, Kings County, at 1-2.

2/ Detective McCarthy gave the following testimony on the issue of probable cause. He and another detective arrested Bush on Dean Street in Brooklyn at 6:00 P.M. on February 17, 1970 for the murder of Robert Wheeler on August 30, 1969. A. at 3.

McCarthy had first heard of Bush on September 22, 1969, when an informant of unproven reliability advised him of Bush's involvement in the crime. The same informant gave similar information on two subsequent dates but admitted its hearsay nature and referred to petitioner as "Popcorn", not as Leon Bush. A. 64-65, 68-69.

Detective McCarthy was told by a second informant of unproven reliability that in early September of 1969 in an apartment at 216 Park Place, Far Rockaway, Brooklyn, while the informant and three others prepared to use drugs, one of the others stated, "Popcorn, you shouldn't have jugged [stabbed] him," to which the man addressed as Popcorn answered that he had stabbed the person because he had "hollered". A. 67-68, 72.

McCarthy was advised by a third "unproven" informant that he, the informant, had witnessed: first, a man known to him say to an unknown white man, "Popcorn didn't have to do that. I didn't know that he was stabbing him"; then the white man ask, "Why didn't you stop him?"; and finally, the first -- presumably black -- man reply, "I couldn't. I was holding his arms, and then I felt him go limp. He was hollering." A. at 68.

On October 24, 1969 a "girl" told McCarthy that Popcorn

was from New Orleans and that he was a cousin of an Edward Richardson. Apparently, this information eventually led to the detective's pre-arrest determination that Popcorn was Leon Bush. A. at 69.

Two persons claiming to have witnessed the crime advised the detective that it had been committed by two individuals who had escaped in an old car. A. at 79-80. McCarthy determined that the car was registered to a Charles Mitchell who lived at the 216 Park Place address where the second informant had claimed to have heard Popcorn admit to stabbing a man. A. at 71. McCarthy also determined that Popcorn visited Mitchell's house frequently. A. at 72.

Five minutes before arresting Bush, one of the three male informants referred to above told McCarthy by telephone that Popcorn was walking up Dean Street with another man and, when asked by McCarthy, "How closely does he [Popcorn] resemble the photo?", replied, "It's the same." A. at 62-63.

McCarthy and another detective proceeded to Dean Street where they accosted Bush and a companion. When asked to identify himself, petitioner claimed he was Donald, not Leon, Bush. A. at 5. He and his companion were then arrested for the murder of Robert Wheeler. A. at 3.

The trial judge's factual and legal conclusions on the arrest issue were as follows:

On the Morales issue, I hold that the officer had probable cause to take the defendant in custody. A. at 81.

* * *

On February 17, 1970, the arresting officer, Detective McCarthy, had within his person[al] knowledge a statement from someone [Popcorn] which would give him a reasonable cause to place the person allegedly making this statement to that civilian [the informant] that he [Popcorn] participated in the commission of a crime in words or substance, to take him into custody and take him to the stationhouse.

A. at 245.

3/ Represented by retained counsel, Bush appealed unsuccessfully on other grounds to both the Appellate Division, Second Department, and the Court of Appeals. 335 NYS2d 370 (2d Dep't 1972), aff'd, 33 NY2d 921 (1973), cert. denied, 419 US 848 (1974). Later, however, he renewed the unlawful arrest claim by a motion to vacate filed pursuant to NYCPL §440.10(1)(h). The motion was denied, apparently without a hearing, on April 13, 1976 by the Supreme Court, Kings County, and leave to appeal was denied by both the Appellate Division and the Court of Appeals on July 20, 1976 and August 19, 1976, respectively.

4/ A criminal defendant in a state court has a right to an "impartial jury" under both the sixth amendment and the due process clause. Ristaino v. Ross, 424 US 589, 595 n 6 (1976), and cases there cited.

5/ Petitioner does not specifically allege that the trial court did not examine any of the prospective jurors individually. His petition sets forth the claim that he was denied an impartial jury by merely quoting the relevant portions of the transcript which preceded and followed the unrecorded voir dire. Prior to the jury's selection, defense counsel indicated his belief that the court would not examine the veniremen individually. A. at 261. After the voir dire, the court commented to the jury:

Mr. Foreman and gentlemen of the jury,
the Court is delighted at the reasonable
speed that was exercised by both lawyers in
their choice of the jury.

I may as well tell you that prior to
this time, when the rules were changed,
the lawyers picked the jury, and each juror
was questioned individually ad infinitum.
But in making the new rules by the Judicial
Conference, in no way is it intended to
deprive the defendant of the right to ques-
tion a prospective juror to ascertain
whether they are really qualified to be
fair jurors to both sides.

A. at 264.

Thus, it is unclear whether any veniremen were questioned individually. In any event, for present purposes it is assumed

that none were.

6/ It is unclear whether petitioner challenges his sentences on grounds other than the double jeopardy clause. If so, the contention would appear to be that his sentences were excessive. See Petition at 11. But the sentences are not susceptible to constitutional attack since they do not exceed the maximum punishments then allowable under New York Penal Law §§ 70.00, 125.15, and 125.25. See Fielding v. LeFevre, slip op at 1495 (CA2 Jan 19, 1977).

7/ After completing its charge, the trial court asked if there were any exceptions. Understandably, petitioner's trial counsel did not object to the court's instructions on either the alibi defense or the corroborative evidence requirement.

East Dist.
Judge Pratt
76 Civ 1676

United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

FOR THE
SECOND CIRCUIT

FILED, MARCH 2, 1978
A. DANIEL FUSARO, CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of March one thousand nine hundred and seventy-eight.

Present:

HONORABLE ROBERT P. ANDERSON

HONORABLE WILFRED FEINBERG

HONORABLE WILLIAM H. TIMBERS

Circuit Judges,

LEON BUSH,

Petitioner-Appellant,

- against -

DAVID R. HARRIS, Superintendent, Green
Haven Correctional Facility,

Respondent-Appellee.

77-2137

Appeal from the United States District Court for the Eastern
District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the case is remanded, without prejudice, of said District Court, to be heard by said court for further consideration of the issue dealt with in Part X of the district court's opinion, dated May 23, 1977.

In this court, appellant argues that he suffered actual prejudice because of the State's refusal to disclose the identity of its alibi rebuttal witnesses, prior to their testimony. Appellant, who was not represented by counsel in the district court, apparently did not make this argument there. We remand to allow him to do so, and we assume he will continue to be represented by appointed counsel.

The district court in its discretion may allow evidence to supplement the record of the State court proceedings and should consider and rule upon whether (1) there was actual prejudice to appellant, as claimed and (2) if so, whether such prejudice is constitutionally significant. Respondent-appellee is not foreclosed in the district court from making any of the contentions urged here.

Robert P. Anderson
ROBERT P. ANDERSON

Wilfred Feinberg
WILFRED FEINBERG

W. H. Timbers
WILLIAM H. TIMBERS

(A true and correct copy of the original is being furnished to the State of New York.)
A. Daniel Swaro

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
LEON BUSH,

Petitioner-Appellant,

-against-

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.
-----X

AFFIDAVIT

76 C 1676

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

STATE OF NEW YORK }

COUNTY OF NEW YORK }

ss.:

★ NOV 2 1976 ★

TIME AM
PM

STEVEN LLOYD BARRETT, being duly sworn, deposes and says:

I am an attorney associated with The Legal Aid Society, Federal Defender Services Appeals Unit, assigned to represent Leon Bush, originally a pro se petitioner before this Court, on his appeal to the United States Court of Appeals for the Second Circuit and on remand to this Court upon order of the Court of Appeals. The question before this Court is whether petitioner suffered constitutional prejudice by operation of an unconstitutional state statute. This affidavit presents petitioner's claim on the issue of prejudice.

By his petition for a writ of habeas corpus filed in this Court on September 10, 1976, petitioner sought to vacate his conviction of September 23, 1971, in the Supreme Court of the State of New York, Kings County, for felony murder and second-degree manslaughter, for which is serving concurrent terms of 15 years to life and 15 years. Petitioner argued, inter alia, that the former New York notice of alibi statute, which contained non-reciprocal discovery provisions and which had been used by the prosecution in his case to obtain the details of his alibi defense without reciprocal disclosure of the State's

(15)

rebuttal witnesses, operated in violation of his due process rights.*

In its memorandum and order dismissing petitioner's petition on the merits, this Court undertook an analysis of the retroactivity question under the test established in Linkletter v. Walker, 381 U.S. 618, 629 (1965); Stovall v. Denno, 388 U.S. 293, 297 (1967); and Michigan v. Payne, 412 U.S. 47, 51 (1973). It concluded that the Wardius doctrine should not be made retroactive. Just prior to considering the three-pronged test, this Court made the following observation regarding the State's rebuttal:

Significantly, however, at no time did defense counsel move for a recess or a continuance in which to prepare his cross-examination of any of the three rebuttal witnesses. See Green v. Fogg, 422 F.Supp. 1034, 1036 (S.D.N.Y. 1976). Nor is there now any allegation of specific prejudice incurred by petitioner as a result of the State's refusal to disclose the identity of these witnesses prior to their testimony. See Mayer v. Moevkens, 373 F.Supp. 649, 654 (D.Vt. 1973), aff'd, 494 F.2d 885 (CA2), cert. denied, 417 U.S. 926 (1974).

(Memorandum at 19-20).

In the Court of Appeals, petitioner argued in favor of retroactivity and claimed actual prejudice arising from the State's failure to apprise petitioner of the identity of their rebuttal witnesses prior to trial. Without reaching the merits of petitioner's claim on the retroactivity of Wardius, the Court of Appeals remanded the case to this Court in an order which stated:

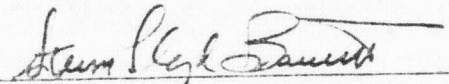
*This argument had been advanced at trial, and had been based on implications in Williams v. Florida, 399 U.S. 78 (1970). During the pendency of petitioner's state appeals, the Supreme Court decided Wardius v. Oregon, 412 U.S. 470 (1973), which held an Oregon statute identical to New York's to be violative of due process. In People v. Bush, 33 N.Y.2d 921 (1973), cert. denied, 419 U.S. 843 (1974), the New York Court of Appeals concluded that the New York statute was indeed unconstitutional under Wardius v. Oregon, but held that this ruling would be accorded purely prospective application and denied relief to petitioner, despite the fact that this was the first case in which the ruling as to the New York statute was announced.

In this Court, appellant argues that he suffered actual prejudice because of the State's refusal to disclose the identity of its alibi rebuttal witnesses, prior to their testimony. Appellant, who was not represented by counsel in the district court, apparently did not make this argument there. We remand to allow him to do so, and we assume he will continue to be represented by appointed counsel.

The district court in its discretion may allow evidence to supplement the record of the State court proceedings and should consider and rule upon whether (1) there was actual prejudice to appellant, as claimed and (2) if so, whether such prejudice is constitutionally significant. Respondent-appellee is not foreclosed in the district court from making any of the contentions urged here.

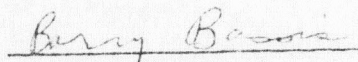
Petitioner's claim of prejudice is based on the unfair surprise which the State was able to effect by withholding the identity of its rebuttal witnesses. As the affidavit of trial counsel Arnold D. Roseman, Esq., annexed hereto, shows, the presentation of Mr. and Mrs. Curtis as surprise witnesses prevented counsel from mounting a fully investigated cross-examination, from finding additional relevant evidence, and, in this murder prosecution, from formulating an effective defense strategy. This Court, therefore, should determine that petitioner was prejudiced by operation of New York's non-reciprocal statute (see accompanying memorandum of law).

WHEREFORE, it is respectfully submitted that prejudice to petitioner by reason of the former, non-reciprocal notice of alibi statute has been established, and that this Court should so advise the Court of Appeals.



STEVEN LLOYD BARRETT

Sworn to before me this
30th day of October 1978


Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
LEON BUSH,

Petitioner-Appellant,

-against-

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.
-----X

AFFIDAVIT
76 C 1676

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARNOLD D. ROSEMAN, being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice in the State of New York, having been admitted to the Bar at an October 1941 Term of the Appellate Division, Second Judicial Department.

I have also been admitted to practice in the United States District Court in this district since 1950; in the Southern District of New York since 1946; in the United States Court of Appeals for the Second Circuit since 1948; and in the United States Supreme Court since 1960.

2. I presently maintain my law offices at 730 Third Avenue, New York, New York 10017, which were formerly located at 405 Lexington Avenue, New York, New York 10017 between 1957 and 1977.

3. This affidavit is being submitted at the request of petitioner-appellant's appellate counsel, Steven Lloyd Barrett, Esq., who indicated to me that this Court (The Honorable George C. Pratt, United States District Judge) had requested from me an affidavit in connection with a hearing ordered by the United States Court of Appeals for the Second Circuit in its Order of Remand dated March 2, 1978.

4. I have been shown certain papers from court files and have, to the best of my recollection, attempted to reconstruct

some of my own thinking and actions which occurred some seven to eight years ago in the years 1970 and 1971 on my representation of petitioner, so as to assist this Court.

5. I was originally assigned by the Supreme Court, Kings County (The Honorable Thomas Cullen) on or about May 13, 1970, to represent a defendant in a criminal case entitled People v. Leon Bush (the petitioner herein) on Indictment #1094/70, under Article 18b, New York County Law, applicable to indigent defendants. Said defendant had been indicted in two counts thereof for common law and felony murder.

6. In the course of that proceeding, I received a notice from the District Attorney of Kings County seeking certain particulars concerning the defense of alibi, if any, and immediately I made a preliminary pre-trial motion to the court seeking a protective order in an effort to avoid disclosing to the People of the State of New York the names of the defendant's witnesses who would testify as to the defendant's non-presence on the date of the murder. I had felt that the then-applicable New York State Law (§295-1, former Code of Criminal Procedure) was unconstitutional in requiring a defendant to give the names of his alibi witnesses without placing a reciprocal requirement upon the People to disclose to the defense its rebuttal or anti-alibi witnesses, if any. I felt that a fundamental unfairness and lack of due process existed in forcing a defendant to disclose but not requiring the People to do so. Based on my knowledge and experience, it was my considered opinion that the United States Supreme Court, if presented with this very issue, would have declared a statute like New York's, with such unilateral requirement, unconstitutional. My opinion was buttressed by an opinion in a case I had read just a few months before in the advance sheets of United States Supreme Court cases, Williams v. Florida, 399 U.S. 78, where the Supreme Court had sustained the validity of a Florida statute containing reciprocal requirements concerning names of alibi witnesses, i.e., the People were to supply in advance their anti-alibi witnesses, as

was the defendant concerning his alibi witnesses. This motion of defendant was denied by the court (The Honorable John R. Starkey) at a Motion Term of the Supreme Court, Kings County.

7. Before the trial, and to further protect the asserted constitutional rights of the defendant, I renewed this preliminary, written motion prior to the actual commencement of the trial, calling it to the attention of a different Justice (The Honorable Hyman Barshay) who had not made the initial pre-trial determination. Mr. Justice Barshay, who was the trial court, indicated that he would not pass upon such alleged claim of the statute's unconstitutionality, would not sustain the defendant's position, and omitted any direction to the prosecutor to disclose to the defense the identities of his rebuttal witnesses. It may be noted that the prosecution, at this time, had already known of and been in possession of this vital information.

8. The identical point was again renewed at the conclusion of all the trial testimony of the prosecution's rebuttal witnesses, when I again called the attention of the trial court to the fact that I had not been given the names and/or statements of the prosecution's rebuttal witnesses who had just testified, and offered a new motion to strike from the record said witnesses' testimony. I called the court's attention again to the fact that I should have at the least been given this testimony two to three weeks before, at a time when the prosecutor said he already had learned of the existence and the prospective testimony of these witnesses. I am reminded that I also stated in substance to the court that I could have done a better job on cross-examination if I had been previously given the names of these rebuttal witnesses.

9. Mindful (1) that this trial took place more than seven years ago, (2) that I have handled many, many indictments, motions, cases, and trials since that time, and (3) that I have been an active practitioner in all courts and have held several public positions, I still maintain it was prejudicial to this defendant's rights that I was not given this requested infor-

mation pre-trial, during which period of time or interval I would have had the opportunity to make an intensive investigation of these two rebuttal witnesses, Miller Curtis and Della Curtis.

10. As a trial attorney here, it came as a surprise to me that these two Curtises were called as rebuttal witnesses to testify as to the presence of the defendant in Brooklyn and on their premises on the very date and at the times when the defendant and others indicated to me that he was in Louisiana.

11. Since the inception of such assignment herein, I had requested and been authorized to employ a private investigator, William Kimmins, a retired Inspector in the New York City Police Department, who had also been authorized by the court to assist me under Article 18b of the County Law. At the time Mr. Kimmins made his preliminary investigation in this case, and in our private discussions, we had no idea that the two Curtises were to be called as rebuttal witnesses; had I been given such information at any time prior to trial, Mr. Kimmins, under my supervision and direction, would certainly have delved into certain areas testified to by the Curtises: (1) one that created a material discrepancy -- that they went to and were in Puerto Rico at the time of the homicide; (2) confirmation of Mr. Curtis' account of seeing petitioner in his bar in late August, to be gleaned from certain persons in the bar where he said he worked; and (3) checking other matters that the Curtises had testified to, but all of which could not possibly be investigated in the limited time allotted to me and due to the necessity for a spontaneous cross-examination. It was difficult, if not impossible, to be able to immediately cross-examine two important rebuttal witnesses without a degree of intensive investigative preparation, as timewise, it could never serve as a predicate to attack a person's credibility on such short notice and in such limited time. In addition, other witnesses in the same bar in which Miller Curtis worked would have also been contacted, possibly found, and interviewed so as to be

able to obtain some information to impeach Curtis. A third rebuttal witness, Frank Rawitz, was not cross-examined because his testimony was undoubtedly true, albeit irrelevant, and because it was not probative of the defendant's presence in Brooklyn on August 30, four days after Rawitz last saw him.

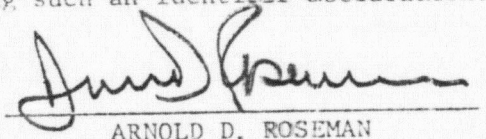
12. Too, defense strategy may well have been altered or modified by me had I been given the names of these latter two rebuttal witnesses in advance and if I had previously been apprised of their existence as proposed rebuttal witnesses. An investigation by former Inspector Krimmins would have been made and completed in advance of the trial, and possibly, too, a different strategy would have been formulated in the trial tactics employed.

AS TO A CONTINUANCE

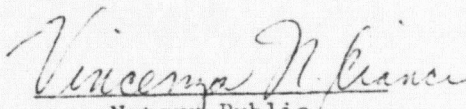
13. Mention is made in the court's opinion that the defendant and his counsel did not seek a continuance, even if brief, at the trial subsequent to the testimony of these two latter rebuttal witnesses. As I recall the events, this possibility may or may not have passed through trial counsel's mind, but in retrospect, looking at it seven years later and reviewing the trial and my cross-examination, if I had asked for a continuance then, after having at least partially attacked the credibility of the two Curtises with the then-meager information and material I had to work with, the defendant's case could easily have been jeopardized and the defendant made to look bad in the eyes of the jury were I to have asked for a continuance or an adjournment. Moreover, it would have served no useful purpose, because a short continuance for the purpose of looking into the backgrounds of these people and checking their direct versions could not have been accomplished in any period less than a week or ten days and my investigator could not have come up with anything worth utilizing in cross-examination. Probably if I had had the witnesses' names two or three weeks prior to trial, other witnesses or information might have

been obtained by me which might have "impeached, discredited or rebutted their then trial testimony." I can only say now that the ability of an investigator and trial counsel to obtain information for use at a trial from persons like Della Curtis or Miller Curtis, in such a short period of time as would have been allowed to me on a short continuance, even if it had been requested and granted, would have been quite difficult, if not impossible.

14. My trial duties and responsibilities terminated when I was replaced by different counsel after the verdict of guilt and before imposition of sentence. This counsel, retained privately by petitioner or his family, represented petitioner in his appeals based on constitutional grounds in the state courts, during which interval my earlier forecast came true when Wardius v. Oregon, 412 U.S. 470, was decided by the Supreme Court in 1973, declaring an Oregon statute similar to the challenged New York State statute unconstitutional, followed by our own New York Court of Appeals in this case, People v. Bush, 33 N.Y.2d 921, 922, which oddly makes no reference at all to the earlier pre-trial motion in 1970 seeking such an identical declaration.


ARNOLD D. ROSEMAN

Sworn to before me this
31st day of October 1978


Notary Public

VINCENZA N. CIANCI
Notary Public, State of New York
No. 03-0627770
Qualified in Bronx County
Commission Expires March 30, 1979

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within affidavits has been mailed by first class mail to the office of the Attorney General of the State of New York, Two World Trade Center, New York, New York 10047.

Stanford Barakat

Dated: New York, New York
October 31, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ NOV 13 1978 ★

TIME A.M. _____
P.M. _____

LEON BUSH,

Petitioner-Appellant,

- against -

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.

AFFIDAVIT

76 C 1676
(Pratt, J.)

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

KATHLEEN H. CASEY, being duly sworn, deposes and
says:

1. I am an Assistant Attorney General assigned to defend respondent before this Court. I make this affidavit in opposition to the affidavits of Steven Lloyd Barrett and Arnold D. Roseman, received on November 1, 1978. In addition, respondent adopts and incorporates in his opposition to petitioner's affidavit and memorandum of law, respondent's brief filed with the United States Court of Appeals for the Second Circuit on February 15, 1978.

2. Messrs. Barrett and Roseman, present and former counsel to petitioner-appellant, allege that the conduct of petitioner's trial was prejudiced when the State called as alibi rebuttal witnesses his landlord and landlady. Specifically, counsels' affidavits dwell on the probabilities of what might have been done had counsel Roseman had two or three weeks notice of the names of the State's alibi witnesses.

3. It is ingenuous for counsel to urge this Court that they were surprised when the petitioner's landlord and landlady were called as rebuttal witnesses. Since petitioner's

14

alibi was that he was in New Orleans at the time of the crime, it is elementary for the State to call as rebuttal witnesses those people who can establish that he was not in New Orleans. It is difficult to conceive of a more obvious choice than petitioner's landlord.

4. Moreover, a reading of Mrs. Curtis' testimony and counsel's most effective cross-examination of her establishes Mr. Roseman's experience and skill as a trial lawyer. Counsel's skill led the witness to contradict herself. On redirect the prosecutor discredited his own witness before the jury. If anything, Mrs. Curtis' testimony probably helped petitioner.

5. Turning to Mr. Curtis, it is once again obvious that Mr. Roseman is an experienced trial counsel. From the record it is evident that he probed every area he felt necessary. The fact that he failed to pursue questioning regarding where Mr. Curtis stayed in Hawaii or Puerto Rico or on what air lines he traveled must be ascribed only to his trial strategy.

6. As counsel so candidly states, seven years have passed since this trial. For that reason, it is undoubtedly difficult for him to recall that the trial recessed at the conclusion of Mr. Curtis' testimony and prior to the testimony of the State's final rebuttal witness, Dr. Catullo, the prison physician. During this adjournment any questions raised by the Curtis' testimony could have been pursued. Once again, failure to pursue a line of questioning can more easily be ascribed to trial strategy, not revealable, than to constitutionally impermissible prejudice.

7. Speculation abounds in counsels' affidavits. Through it all emerges the hard facts -- this testimony should have been expected, it is lacking in prejudicial effect and every thing possible was done to impeach the Curtis' credibility.

8. As set forth in the Attorney General's brief as submitted to the United States Court of Appeals for the Second Circuit, Points II, III and IV, on pages 21 to 40, and for the reasons as set forth petitioner was not prejudiced by this testimony.

9. Finally, in assessing the impact of the Curtis' testimony, petitioner's own testimony must be recalled. On page 570 of the trial transcript petitioner was asked on cross-examination:

Q. "When did you first remember that it was August 27, 1969 that you went back to New Orleans?"

MR. ROSEMAN: "Again I object."

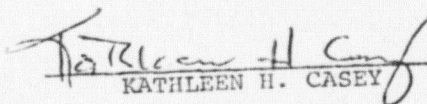
THE COURT: Suppose you reframe the question. When did you come to the conclusion that it was August 27, 1969?

THE WITNESS: Today.

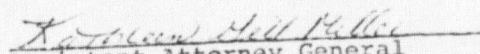
Q. Today?

A. Yes.

WHEREFORE, it is respectfully requested that this Court find that there was no prejudice to petitioner by reason of the operation of New York State's former notice of alibi statute.


KATHLEEN H. CASEY

Sworn to before me this
8th day of November, 1978


Assistant Attorney General
of the State of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEON BUSH,

Petitioner,

-against-

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent.

AFFIDAVIT

76 C 1676

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

★ NOV 27 1978 ★

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STEVEN LLOYD BARRETT, being duly sworn, deposes and says:

I am an attorney associated with The Legal Aid Society, Federal Defender Services Appeals Unit, assigned to represent Leon Bush, originally a pro se petitioner before this Court, on his appeal to the United States Court of Appeals for the Second Circuit and on remand to this Court upon order of the Court of Appeals. The question before this Court is whether petitioner suffered constitutional prejudice by operation of an unconstitutional state statute.

This supplemental affidavit is offered to provide new information relative to the question of prejudice. In our memorandum of law to this Court, filed October 30, 1978, we argued that while this Court was correct in its observation at the October 20 conference that independent evidence establishing that the Curtises were in Puerto Rico at the end of August 1969 rather than in New York City would be the most definitive proof of prejudice, the passage of time made it unlikely that such proof could be developed. We also noted that the question of prejudice should be considered from the standpoint of the options available to trial counsel eight years ago instead of our current ability to establish the untruthfulness of the Curtises' account. To facilitate this determination, we provided the Court with the affidavit of trial counsel which, along with the

trial transcript, constitute evidence of prejudice at petitioner's trial.

Nevertheless, during the past month, we have endeavored to determine what evidence related to the question of the Curtises' account is currently available. Our efforts and the minimal information obtained will be discussed in this affidavit. The purpose of this affidavit is to establish that the truth of the Curtises' account cannot at this time be independently verified or contradicted. Thus, in reaching a conclusion on prejudice, the Court should be aware that the materials we have provided are as complete as possible, and that the quality of our proof on prejudice must be based in part on likelihoods rather than certainties.

I.

The Curtises are not available as witnesses. Della Curtis is deceased; Miller Curtis sold his house in Brooklyn and has moved out of New York State. Through the attorney who handled the sale of the Curtises' house, we were able to make contact with Miller Curtis. However, Curtis' lawyer, who apparently was able to contact Curtis at a temporary New York address, refused to disclose that address to us; instead, he advised Curtis of our interest in speaking to him and communicated our request that Curtis call this office.

Miller Curtis telephoned on November 1, 1978, and I spoke to him for approximately 30 minutes. Curtis stated that he was in the process of leaving Brooklyn for the South. He said that there was no temporary address or telephone number in Brooklyn at which he could be reached. And he declined to reveal anything about his new address other than, after substantial prodding, to say that it was in Alabama.

Curtis stated that he and his wife travelled extensively between 1969 and 1974. As to the first stop in 1969, Curtis provided the following information at various times in the conversation: Hawaii was the first stop; the Curtises may have travelled to Puerto Rico before the "big trip" to Hawaii; he

did not recall which was the first trip; the trip to Hawaii was at approximately the beginning of October 1969. An important fact not included in his trial testimony was that he and his wife went to Puerto Rico twice during this period; he did not recall the dates. He had no recollection of the airline on which he travelled to Puerto Rico; he had no records of payment for airline tickets or other materials from which that could be determined, but indicated that he and his wife may have flown TWA, since his wife had had a TWA credit card. When the Curtises stayed in Puerto Rico, they lodged at the Geronimo Hotel in San Juan and remained for between a week and ten days.

Toward the very end of the conversation, Curtis said that he was sure that he was in Puerto Rico in 1969, and reiterated that he had gone there a second time also. When I reminded him that he had said he went to Hawaii in 1969, Curtis said that he had not meant Puerto Rico, but Hawaii, in his immediately preceding statement.

Curtis refused to leave any kind of address or telephone number, but agreed to call me back for further discussions on the following Monday, November 6. (He was told that he could call collect from out of state.) Curtis never called back.

Edward Clay, an investigator employed by The Legal Aid Society, attempted to use the information obtained from Curtis to determine whether dates of Curtis' trips to Puerto Rico could be established. Mr. Clay determined that TWA had no flights to San Juan and that their credit card could not be used to charge tickets on either American or Eastern Airlines, the two airlines which do fly to San Juan. As to the Geronimo Hotel, it is no longer in business; it changed hands twice in 1969, first becoming the Condado Geronimo, and then a Holiday Inn. Mr. Clay was directed to a Mr. Espinet in San Juan. Mr. Espinet, who was connected with the hotel, advised Mr. Clay that the records of the Geronimo Hotel pertaining to 1969 and 1970 have been destroyed, since the hotel is legally obliged to maintain records for only six years.

I discussed with Mr. Clay the feasibility of travelling to Puerto Rico for further and independent investigation which might reveal whether Curtis was in Puerto during August 1969. It has been determined that the unavailability of Curtis and of any information he could provide as to his stay in Puerto Rico renders an investigation in Puerto Rico futile at this time.

II

We requested and obtained from the District Attorney of New York, Kings County, a copy of the notes of police officer McCarthy reflecting the conversation with Curtis in which Curtis stated that he was in Puerto Rico in August 1969. (A copy of the notes is annexed hereto.) These notes are significant in that they suggest that Curtis' account of having gone to Puerto Rico in August 1969 was not a mere slip of the tongue, as Curtis testified at trial, but a truthful statement based on his recollection of distinct events occurring before and after his trip to Puerto Rico. The notes indicate the following:

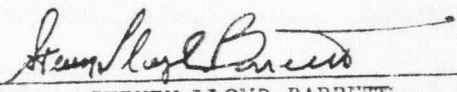
Gerald Richardson (Eddie's brother) rented a room there [Curtis' house] in Aug. 68. In May or June of 1969, Eddie R. moved in with Gerald. A couple of days later, LB [Leon Bush] moved in. During the summer, all 3 of them stayed there. Saw LB just about every day in and around the house and in the bar. He [Curtis] went to Puerto Rico on either 8/27 or 8/28 -- He saw LB between the time that Mr. Rawitz cashed the check and the time that he left. Returned from Puerto Rico on Sept. 4 or 5 -- Bush was still there. He evicted all 3 of them on 9/6.

(Emphasis added.)

From this chronology, it appears that Curtis' recollection of his trip to Puerto Rico was inseparable from his recollection of other occurrences he described -- his reference points. Curtis' disavowal at trial of his statement that he was in Puerto Rico in August 1969, in light of the reasoning and recollecting which accompanied his statement to McCarthy, appears more likely to be an effort to avoid a contradiction with his testimony that he saw petitioner in New York than an innocent mistake.

The notes, therefore, provide a sound basis for concluding that a full investigation of Curtis' whereabouts at the end of August 1969 may well have established that, contrary to his highly damaging trial testimony, he was in Puerto Rico at the very time he said he saw petitioner in New York. The investigation which trial counsel could have pursued might have included the very matters we are now unable to pursue. In determining the prejudice which arose from the surprise presentation of Curtis, we ask the Court to be mindful that the current limitations on our ability to demonstrate the falsity of Curtis' testimony was not present when the case was tried, and we respectfully submit that a fair reading of the record must lead to the conclusion that petitioner suffered substantial prejudice at trial by the unfair surprise which was utilized by the State.

WHEREFORE, it is respectfully submitted that prejudice to petitioner by reason of the former, non-reciprocal notice-of-alibi statute has been established, and that this Court should so advise the Court of Appeals.


STEVEN LLOYD BARRETT

Sworn to before me this
day of November 1978


Notary Public

NOTARY PUBLIC
NOTARY

[illegible]

and manage the bar.
Miller, Carter - owner of Jack Villa (argued
He comes from 121 Spring Villa) ~~John K. L.~~
Donald Richardson (Eddie's brother) - visited the house
room there in Aug. etc. In Aug or June 1909 Eddie
He moved - with Donald. A long day. Later
LB moved - During the summer, all 3 of them stayed
there. Saw LB just about every day in and around
the house and in the bar. He had 2 boats placed
on either side of the house - he saw LB between the times
that Mr. Flannery called the club at the house that
he left. Distance from Spanish River only 4 or 5 -
Back was LB there. He visited all 3 of them on
4/16. Mary Della Carter was very all there.

Rev. [] 10 [] 2d

CERTIFICATE OF SERVICE

November 22, 1978

I certify that a copy of the within supplementary affidavit has been served by mail upon Kathleen Casey, Assistant Attorney General of the State of New York.

Steven Lloyd Barakat

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ AUG 10 1979 ★

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M. _____
P.M. _____

----- x
LEON BUSH,

DOCKET NO. 76 C 1676

Petitioner,

- against -

MEMORANDUM AND ORDER

DAVID R. HARRIS, Superintendent
Green Haven Correctional Facility,

Respondent.
----- x

PRATT, J:

On the appeal of this court's decision of May 23, 1977 dismissing petitioner's application for a writ of habeas corpus, the Second Circuit Court of Appeals remanded for further consideration of the notice-of-alibi issue. This court has been directed to determine whether there was actual prejudice to the petitioner at the state trial as a result of the prosecutor's refusal to disclose the identity of its alibi rebuttal witnesses prior to their testimony, and, if so, whether such prejudice is constitutionally significant. Bush v. Harris, No. 77-2137 (CA2 March 2, 1978).

Counsel for both sides rely primarily on the arguments contained in their respective appellate briefs, which have been supplemented with further written arguments and affidavits. Counsel have also agreed that there would be no purpose served in holding an evidentiary hearing to examine

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the state trial attorney and the respondent's rebuttal witnesses; one of the witnesses is now deceased, a second has moved out of New York State, and whatever the trial attorney would testify to has been incorporated in an affidavit submitted to the court.

Accordingly, upon consideration of the record of the state proceedings, including the transcript of the state trial and all other written submissions, the court finds that petitioner did not suffer actual prejudice in connection with the testimony of the alibi rebuttal witnesses, and it is therefore unnecessary to determine whether any prejudice was of constitutional magnitude.

In the initial consideration of petitioner's application for a writ of habeas corpus, the court found the following:

The State's case was based to a large extent upon Bush's confessions. In an attempt to establish an alibi, he adduced testimony of friends and relatives to the effect that he had been in New Orleans at the time of the crime. Bush himself testified that on August 27, 1969, three days prior to the stabbing, he left Brooklyn for New Orleans where he remained until the following December. In rebuttal, the State elicited testimony that he had been in Brooklyn throughout August and the first half of September of 1969.

* * *

The first of the State's three rebuttal witnesses was a Mr. Rawitz. He testified

that Bush cashed a bad check at his Brooklyn bar on August 26, 1969, four days before the murder. While this testimony contradicted Bush's grand jury testimony, it was consistent with his testimony at trial. Presumably for this reason, Rawitz was not cross-examined.

The only rebuttal witnesses who contradicted the trial version of Bush's alibi were a Mr. and a Mrs. Curtis. They testified that in the summer of 1969 they had rented a room to Bush's cousin, Gerald Richardson, that Bush had shared the room with Richardson during the latter part of the summer, and that Mr. Curtis had been forced to evict Bush and Richardson on September 16, 1969, for failure to pay the rent. Since Bush had previously testified to his presence in New Orleans during the entire month of September, 1969, defense counsel cross-examined both Mr. and Mrs. Curtis. Significantly, however, at no time did defense counsel move for a recess or a continuance in which to prepare his cross-examination of any of the three rebuttal witnesses.

Bush v. Fogg, No. 76 C 1676 at 2, 19
(EDNY May 23, 1977).

On the direct appeal of petitioner's conviction, the New York Court of Appeals held the then New York notice-of-alibi statute to be unconstitutional on the basis of Wardius v. Oregon, 412 US 470 (1973). The court declined, however, to apply Wardius retroactively for the following reasons:

In our view [the notice-of-alibi statute] as applied in this instance did not operate to exclude testimony. In response to the District Attorney's demand, defendant furnished the names of the alibi witnesses. Their testimony was admitted on trial, that of the prosecution's

rebuttal witnesses. The statute operated only to deny defendant advance notice of the identity of these rebuttal witnesses, and to this extent to hinder his preparation to impeach, discredit or rebut their testimony. He was not, however, inhibited in his own opportunity by direct evidence to establish his alibi. The infringement of defendant's right went only to a collateral though not unimportant issue. Thus, we conclude that on this record the operation of the rule did not go to "the very integrity of the fact-finding process"; rather, it touched on procedural fairness.

People v. Bush, 33 NY2d 921 (1973), cert. denied 419 US 848 (1974) (emph. added).

The court must now determine whether petitioner "suffered actual prejudice because of the state's refusal to disclose the identity of its alibi rebuttal witnesses, prior to their testimony." Bush v. Harris, *supra*. Petitioner contends that he suffered actual prejudice because the element of surprise left him unable to prepare and conduct an effective cross-examination of the alibi rebuttal witnesses who offered damaging testimony. He argues that his is a particularly compelling situation because it appears from the record that their testimony was susceptible to attack.

Mrs. Curtis testified on cross-examination that she had spoken to "an investigator" from "the City" in November 1969, and that the individual had taken notes at the time (Tr. 624-27); on re-direct, she testified that the first time she spoke to anyone about the case was approximately three weeks prior to trial, in 1971 (Tr. 634). The prosecutor

disavowed knowledge of the earlier interview, or the existence of notes. Petitioner argues that these disclosures raised and left unanswered questions as to Mrs. Curtis' timing, motivations, and honesty, and that such issues "could have been investigated and explored on cross-examination had there been adequate time." Appellant's brief at 21.

Petitioner urges that Mr. Curtis' testimony raised even more serious questions. Mr. Curtis testified on direct examination at times he saw the petitioner in Brooklyn between August and November 1969, (Tr. 635-39), thus contradicting the alibi that petitioner was in New Orleans at the time in question. Mr. Curtis also testified that he had evicted petitioner from his rooming house on September 16, 1969, and that at times subsequent to that date he would see the petitioner on a street in the neighborhood and in the bar he managed. This also contradicted petitioner's alibi that he was in New Orleans until December 1969. On cross-examination, petitioner's defense attorney elicited testimony that at an interview with the prosecutor prior to the trial, Mr. Curtis had stated that he had gone to Puerto Rico in late August 1969 (Tr. 647-50); at the trial, Mr. Curtis changed his prior statement by claiming to have made a mistake, and testified that the Puerto Rico trip took place in 1970. Petitioner urges that if defense counsel had had adequate time to investigate Mr. Curtis' account, he might have been able to

prove it to be untrue.

Other than their trial testimony, the only evidence of the Curtises' whereabouts at the time in question are notes taken by the prosecutor who interviewed Mr. Curtis prior to the trial:

Gerald Richardson (Eddie's brother) rented a room there [Curtises' house] in Aug. 68. In May or June of 1969, Eddie R. moved in with Gerald. A couple of days later, LB [petitioner Leon Bush] moved in. During the summer, all 3 of them stayed there. Saw LB just about every day, in and around the house and in the bar. He [Curtis] went to Puerto Rico on either 8/27 or 8/28 -- He saw LB between the time that Mr. Rawitz cashed the check and the time that he left. Returned from Puerto Rico on Sept. 4 or 5 -- Bush was still there. He evicted all 3 of them on 9/16. Mrs. Della Curtis can verify all this.

Exhibit attached to Affidavit of Steven Lloyd Barrett, sworn to November 22, 1978 (emph. added).

Although there is no indication in the notes as to when the interview with Curtis took place or when the notes were made (i.e., during or after the interview), the record shows that the interview was held at the end of April 1971, almost two years after the incident leading to petitioner's conviction, and approximately two weeks before the trial.

Under cross-examination, Curtis explained the discrepancy between the prosecutor's notes and his trial testimony by stating that he realized he had made a mistake immediately after the interview with the prosecutor, although he did nothing about it until he testified at trial. Further-

more, Curtis testified that he knew he had not gone to Puerto Rico in 1969 because he had gone to Hawaii in October of that year, and that the Puerto Rico trip took place the following year, in 1970. Petitioner has submitted no affidavits of his own or of his roommates at the Curtis house, that dispute Curtis' version of his whereabouts in August 1969. The truth of the Curtises' whereabouts at the time in question thus remains unknown.

In an affidavit submitted to the court, petitioner's state trial attorney, Arnold Roseman, states:

As a trial attorney here, it came as a surprise to me that these two Curtises were called as rebuttal witnesses to testify as to the presence of the defendant in Brooklyn and on their premises on the very date and at the times when the defendant and others indicated to me that he was in Louisiana.

Affidavit of Arnold Roseman, ¶10, sworn to October 31, 1978.

Despite this assertion of surprise, however, petitioner has not shown any evidence of actual prejudice stemming from lack of notice of the identity of the alibi rebuttal witnesses.

As to Mrs. Curtis, petitioner has not pointed out any additional impeaching information he would have uncovered had she been identified in advance of trial, thus leaving us merely to speculate as to what the claimed prejudice might have been.

Similarly as to Mr. Curtis, petitioner points to

not even one additional fact which would have been available at trial if advance identification had been made. Mr. Curtis gave a plausible explanation for telling the prosecutor he had been in Puerto Rico during part of the period that he testified petitioner was in New York. If petitioner now presented some evidence that Mr. Curtis was in Puerto Rico at that time, then prejudice would have to be assumed. But there is no such evidence.

After the remand from the Second Circuit, petitioner's current appointed counsel undertook an investigation into the Curtises' direct testimony, but was unable to obtain information either corroborating or impeaching their stated version as to petitioner's, or their own, whereabouts at the time in question. Petitioner's counsel spoke to Mr. Curtis briefly by telephone on November 1, 1978, but states that he was unable to clarify any of the outstanding questions. Mr. Curtis never made a promised return call, and his whereabouts are presently unknown to counsel. An investigator for petitioner's counsel attempted to use the information obtained from the telephone conversation with Curtis to determine whether the dates of the Curtises' trips to Puerto Rico could be established. However, his investigation was to no avail. Thus, there is no evidence that Mr. Curtis lied in his testimony about the year of the Puerto Rico trip and therefore no evidence that petitioner was prejudiced by lack of

notice of the identity of the rebuttal witnesses.

Nor can it be said that petitioner diligently pursued the question either before or at the trial. The rebuttal witnesses were known to petitioner, and the possibility of their testifying could, perhaps should, have been anticipated; Mr. Curtis was, in effect, petitioner's landlord who saw petitioner frequently, either in his house or in his bar. Petitioner could have expected that such a person might well be called to testify on the alibi issue at the trial. This is especially so, since Curtis' testimony of petitioner's whereabouts would have been the "flip" side of the alibi witnesses' testimony, if the latter were to be believed. Thus, petitioner was not only able to present an alibi defense, but could have buttressed it with testimony of his landlord as to his absence from New York at the time in question.

Petitioner did not request a continuance after the direct examination of the alibi rebuttal witnesses, and indeed, asked for no continuance at any time in that regard, even though the Curtises' testimony came well before the end of the trial. Furthermore, petitioner did not request permission to reexamine Mrs. Curtis, either in or out of the jury's presence, in order to verify Mr. Curtis' claim of error about the year of the Puerto Rico trip.

Since the court has thus found no evidence of

actual prejudice, there is no issue of whether any prejudice was constitutionally significant. However, the court has considered the context of the asserted prejudice and notes that its focus is not on the direct issues of guilt, but on the collateral claim of alibi.

Despite the claim of petitioner's attorney that he was hampered in his cross-examination of the Curtises, it is clear from the record that he attacked them vigorously, made effective use of the minor contradictions, and effectively argued the credibility questions in summation. It is true that, based on their testimony, some questions were left unanswered: with respect to Mrs. Curtis, whether an investigator had visited her in November 1969; with respect to Mr. Curtis, whether the trip to Puerto Rico was in 1969 rather than in 1970. The general question derived from these, however, is the witnesses' credibility.

Ultimately, in its function as a trier of fact, the jury must weigh the testimony of witnesses in light of their credibility. Petitioner presented a set of alibi witnesses placing him in New Orleans from August 27, 1969 until December 1969. In rebuttal the Curtises testified they saw petitioner frequently in New York from June 1969 until September 16, 1969 when they evicted him and his roommates from the room rented to them. Credibility was central on this claimed alibi. However, for the jury to believe the

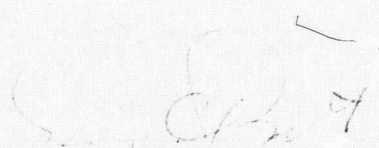
rebuttal witnesses would not necessarily have led to a conviction, since the prosecution still had to prove the elements of the crime itself, not just the fact that the defendant was present in New York. Similarly, even if defense counsel were successful and the rebuttal witnesses were disbelieved, an acquittal would not necessarily have resulted, since the jury could have chosen to disbelieve the alibi witnesses as well (in this case, petitioner's family members and friends), and reached their decision on the other evidence in the case.

Finally, there were other factors in this case which the jury had to consider, not the least of which was a voluntary confession by the petitioner, admitted into evidence at the trial.

Accordingly, for the reasons set forth above, the court finds there was no actual prejudice to the petitioner resulting from lack of notice of the identity of the three rebuttal witnesses, and adheres to its decision of May 23, 1977, denying petitioner's application for a writ of habeas corpus.

SO ORDERED.

Dated: Westbury, New York
August 7, 1979.



GEORGE C. PRATT
U. S. DISTRICT JUDGE

CERTIFICATE OF SERVICE

January 27, 1980

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

John G. L. Bennett